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April 5, 1996

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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: WT Docket No. 95-157

Dear Mr. Caton:

In accordance with Section 1.1206 (a) (2) of the Commission's Rules, 47 C.F.R. § 1.1206 (a) (2) (1991), this is to notify the Commission that on April 5, 1996, copies of the enclosed materials were sent to Karen Brinkmann and Linda Kinney.

Respectfully submitted,

Robert J. Butler

RJB:daj
Enclosures

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PCS CONCERNS REGARDING CONTINUED SECONDARY LICENSING OF MICROWAVE OPERATIONS IN THE 2 GHZ BAND

During the recent rulemaking proceedings on Microwave Relocation Cost Sharing, several PCS interests, including PCIA, UTAM, AT&T Wireless, and PCS Primeco, L.P., requested that the Commission discontinue allowing any primary or secondary licensing of microwave operations in the 2 GHz band. See, e.g., Comments of AT&T Wireless, WT Docket No. 95-157 at 13 (filed Nov. 30, 1995)(stating that there should be no additional primary or secondary licenses granted to microwave operators); Comments of PCS Primeco, L.P., WT Docket No. 95-157 at 19 (filed Nov. 30, 1995)(emphasizing the potential for interference to PCS operations from secondary microwave licensees). Secondary licensing of microwave operations in the 2 GHz band poses risks of interference to PCS licensees in that band. As PCS operations continue to expand, secondary microwave operations will be more likely to cause interference to and suffer interference from PCS licensees.

PCS interests are concerned because some entities have suggested that applicable statutes and FCC rules could be interpreted to entitle secondary microwave licensees to certain "process," including the right to a hearing, prior to the Commission's issuing a cease and desist order or revoking their licenses because of interference to PCS operations. Any such delay in removing harmful interference to ongoing PCS operations could be detrimental to the development of these new services. Moreover, even if interfering operations could be shut down quickly, any requirement for additional formal proceedings could impose unnecessary costs on PCS licensees.

We note that Section 94.101 of 47 C.F.R. requires that radiation of a microwave transmitter "be suspended immediately upon notification by the Commission of a deviation from the technical requirements of the station authorization when such deviation causes harmful interference to another licensee." The FCC has confirmed that such a provision would deny a licensee the right to a prior hearing and, in the context of low power television has stated that "a secondary service [causing interference to primary services] . . . can be compelled without a hearing to leave the air until the problem is resolved." In re Application of Womens Media Investors of Dallas, MM Docket No. 84-659, 6-7 (June 29, 1984). In support of this conclusion, the Commission cited Section 74.703, which like Section 94.101 requires a station licensee to discontinue operation if interference is being caused by spurious emissions from the station.[1]

Notwithstanding these provisions, it has been suggested that notice and a hearing may still be required for a formal cease and desist order or the revocation of a microwave license under the Communications Act.[2] Section 312 of the Act,

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[1] Although Section 94.101 is similar to Section 74.703, it is unclear whether causing interference to PCS operations through the normal operation of a microwave link would be a "deviation from the technical requirements of the station authorization." If not, the link could be operating properly within its licensed frequencies but still causing interference, and Section 94.101 might be argued to be inapplicable.

[2] In In the Matter of Amendment of the Rules with Respect to Hours of Operations of Standard Broadcast Stations, Memorandum Opinion and Order, 10 FCC2d 283, 308 (1967), the FCC said it could terminate a PSA without a hearing.

(continued...)

47 U.S.C. § 312, provides that the Commission may revoke any station license "for willful or repeated failure to operate substantially as set forth in the license." However, before the Commission can revoke a license or issue a cease and desist order, it must give notice and the opportunity for a hearing to the licensee. 47 U.S.C. § 312(a)(3); 5 U.S.C. 558(c). These rights are embodied in the FCC's rules as follows:

- Except in cases of willfulness or where the public health, interest, or safety requires, the licensee is entitled to written notice of the violation and ten days in which to respond. 47 C.F.R. § 1.89.

- If it appears that a station license should be revoked and/or that a cease and desist order should be issued, the FCC will issue an order directing the licensee to show cause why a cease or desist order or order of revocation should not be issued and will call upon the licensee to appear before the Commission at a hearing. The hearing must be not less than thirty days after the order is received by the licensee, except in cases involving the safety of life and property in which case the hearing may be held in less than thirty days. 47 C.F.R. § 1.91.

It remains subject to debate whether the decisions and rule provisions discussed above override these requirements in some or all respects.

For example, in view of the FCC's broad construction of "willfulness," if a secondary microwave licensee in the 2 GHz band were causing interference to a PCS licensee and 47 C.F.R. § 1.89 were applicable, the FCC would likely not be required to give notice of a violation to the microwave licensee. The licensee's intentional

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[2](...continued)
However, there the FCC relied on 47 C.F.R. § 73.99(f) [now § 73.99(h)(i)], which specifically states that notice and the right to a hearing is not required to suspend, modify, or withdraw the right to operate. No comparable provision exists in Part 94.

operation of the link causing interference would probably constitute willful action under the FCC's definition.[3] But, the removal of the notice requirement would have no impact on any hearing that might otherwise be required under the Act.

It follows that, even if a secondary licensee was not entitled to a Section 1.89 notice, and even if its operations could be shut down in the interim, it might still claim to be entitled to a hearing under Section 1.91 in which the burden of proof would be on the Commission before the license could be revoked or a cease and desist order could be issued. See 47 U.S.C. § 312(d). If such a claim were upheld, it could burden the PCS licensee with the need to compile evidence and assist the FCC in proving that the microwave licensee was causing interference to the PCS operations. It would clearly be contrary to FCC policy to impose such unnecessary costs on PCS licensees.

In sum, the uncertainties surrounding the hearing rights of secondary microwave licensees in the 2 GHz band require clarification. PCS licensees are concerned not only with the potential interference to their operations, but also with the possibility that there could be a substantial delay in stopping such interference if hearings are required

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[3] Willfulness is defined in Section 312(f)(1) as "the conscious and deliberate commission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act. . . ." The FCC clarified this standard in Midwest Radio-Television Inc., 1 RR2d (P&F) 491, 495 (1963), stating that willfully "does not require a showing that the licensee knew he was acting wrongfully; it requires only that the Commission establish that the licensee knew that he was doing the act in question -- in short, that the acts were not accidental (such as brushing against a power knob or switch)." See also Letter to Lawrence J. Movshin, Esq. from Richard M. Smith, Chief, Field Operations Bureau, 7 FCC Rcd 3162 (1992).

and that PCS licensees will be responsible for the costs of providing formal proof of the problems they are experiencing in such hearings. Moreover, allowing new secondary licensing when PCS operations are continuing to expand will result in microwave licensees spending considerable sums to construct systems which will likely have to be shut down in the near future. Therefore, the Commission should reconsider its decision to continue allowing additional secondary licensing of microwave operations in the PCS band.

COST SHARING AND MICROWAVE RELOCATION ISSUES

PCIA Cost Sharing Issues

- The costs of tower modifications as well as tower construction should be included in the separate $150,000 per link tower cost cap.

- The costs of analog to digital conversions during the voluntary negotiation period, subject to the $250,000 cap, should be deemed reimbursable cost sharing expenses. During the mandatory period, such costs would not be reimbursable.

- In the cost sharing formula, T_1 should be the date of relocation as determined in the relocation agreement, rather than a uniform date for all relocators.

- T_N, the date subsequent PCS providers enter the market, should be calculated by adding two months to the PCN date.

- To determine cost sharing obligations, PCIA supports the use of the Proximity Threshold suggested by several commenters rather than TIA Bulletin 10F.

- A PCS entity should always be entitled to 100% reimbursement up to the cap for relocating a link outside its spectrum block.

- When a PCS entity relocates an incumbent who was completely within the PCS entity's spectrum block and with one endpoint in the PCS entity's market area, the PCS entity should receive reimbursement (up to the cap) for 50% of the link relocation costs.

- PCIA should serve as the industry clearinghouse to administer the cost sharing plan.

PCIA Microwave Relocation Issues

- The FCC should eliminate the voluntary negotiation period for all incumbents. If not, then the good faith negotiation requirement should be applied to that two-year period.

- Good faith negotiations during the mandatory period should be defined as an offer by a PCS provider and acceptance by an incumbent of comparable facilities.

- The definition of comparable facilities should be based on technical factors which can be objectively measured such that, for example, a system comparable to a 2 GHz analog system could be a 6 GHz analog system.

- Comparable facilities should be limited to the actual costs of relocation and should not include consultant or legal fees not authorized by the PCS provider.

- Parties unable to conclude negotiations within one year after the start of the voluntary negotiation period (if the Commission maintains voluntary periods) should be required to file two independent cost estimates of a comparable system with the FCC to help resolve differences.

- PCS providers should only be required to relocate links which would suffer interference from their PCS operations.

- The FCC should not allow any additional primary or secondary licensing of microwave operations in the 2 GHz band.

- PCS providers should be permitted to initiate the voluntary relocation period (if it is maintained) for incumbents outside the A and B blocks by sending a letter that notifies them of the PCS provider's desire to begin relocation negotiations.

- At the start of the twelve-month test period, an incumbent's authorization should return to the FCC, and at the end of the twelve-month test period, the FCC should make an announcement that the license has been terminated.

- Incumbents who choose to relocate their own systems in exchange for a cash payment should not be entitled to the twelve-month test period since the PCS provider will have no input into the construction of the relocated link and will be unable to resolve any difficulties. Other incumbents should be permitted to waive the test period by contract.

- PCS providers should not be required to hold a relocated incumbent's spectrum in reserve, but should be required to guarantee the incumbent a comparable replacement system. Holding such spectrum in reserve will delay the deployment of PCS systems for at least a full year.

- Incumbents should be required to verify their public safety status to PCS providers if they want to take advantage of the extended negotiation periods. In addition, the definition of public safety entities entitled to extended relocation schedules should be limited to those cases where substantially all of a licensee's communications are related to the protection of life and property.

- All incumbent microwave operations remaining in the 2 GHz band as of April 4, 2005 should be converted to secondary status.